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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

## **SUMMARY OF RESPONSE**

Defendants' (Second) Motion to Dismiss admits intruding into Plaintiff's business and trespassing into his computer. It draws no difference between Defendants' sly trespass into Plaintiff's affairs and Peter Piper Pizza pasting a 2 for 1 pizza ad on the inside of the Plaintiff's front door. Defendants are spammers of the worst kind, and it is time to stop them.

Defendants argue that their trespass and intrusion into Plaintiff's private computer is beyond the reach of the Court because any cause of action is pre-empted by the CAN-

SPAM Act. This is not so. The CAN-SPAM act pre-emption is exceedingly narrow. It pre-empts *only* that part of the state law that *expressly* regulates the use of electronic mail to send commercial messages; however, it *does not* pre-empt State claims of “falsity” or “deception” in commercial e-mails. In addition, state claims based on trespass or other torts are *specifically* permitted. The narrowness of the pre-emption is overwhelmed by the broad breath of exclusions:

1. State law based on “falsity or deception in any portion of a commercial electronic  
9 mail message or information attached thereto”; or
2. State law that does not “expressly regulates the use of electronic mail” (such as the  
11 Arizona Consumer Fraud Act, § 44-1522); or
3. State laws relating to “trespass”; or
4. State law relating to “tort law”.

The e-mail in issue here violates the Consumer Fraud Act; it represents a classic example of “trespass to chattel”; and it tortiously invades Plaintiff’s right of seclusion. On the matter of a more definite statement, Plaintiff herewith files his First Amended Complaint as of right.

This response is more fully supported by the following Memorandum of Points and Authorities, which is by this reference incorporated herein.

#### **MEMORANDUM OF POINTS AND AUTHORITIES**

15 U.S.C. § 7707(b) provides, in its entirety:

25 (b) State law

(1) In general

This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

(2) State law not specific to electronic mail

This chapter shall not be construed to preempt the applicability of—

(A) State laws that are not specific to electronic mail, including State trespass, contract, or tort law; or

(B) other State laws to the extent that those laws relate to acts of fraud or computer crime.

**1) Federal Pre-Emption is Limited to State Law “Expressly Regulat[ing] the Use of Electronic Mail” That Does Not Also Regulate “Falsity” or “Deception”**

By the express wording of the statute, federal pre-emption applies *only* to state law that “expressly regulates the use of electronic mail to send commercial messages” 15 U.S.C. § 7707(b)(1) but only to the extent that such regulation does not “prohibit [the] falsity or deception in any portion of a commercial electronic mail message”. Id.

In passing 15 U.S.C. § 7707(b), Congress did not purport to define "falsity" or "deception". It is ancient learning that it is within the province of a state to define malfeasance and fix the remedies therefore. *Cox v. Maxwell*, 366 F.2d 765 (6th Cir. 1966). "[T]he historic police powers of the States [are] not to be superseded by [federal legislation] unless that was the clear and manifest purpose of Congress.' " *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This presumption applies whenever "Congress has 'legislated . . . in a field

1 which the States have traditionally occupied.' " Id. (quoting *Rice*, 331 U.S. at 230).  
2 Traditionally, the power to define offenses is one of those historic police powers referenced  
3 by the Supreme Court in *Medtronic*. 15 U.S.C. does not purport to pre-empt the State's right  
4 to define the terms "falsity" or "deception".  
5

6 In the matter at hand, the Arizona Legislature chose to define the omission of the  
7 characters "ADV:" in the subject line of the e-mail as a deceptive act. A.R.S. §§ 44-1372  
8 and 44-1522, read together, do no more than "prohibit [the] falsity or deception in any  
9 portion of a commercial electronic mail message or information attached thereto". 15-  
10 7707(b)(1) And to make absolutely sure that the Arizona Statute does not offend the federal  
11 supremacy clause, the legislature saw it fit to specifically legislate that the omission of the  
12 characters "ADV:" is a deceptive practice in violation of 44-1522. See A.R.S. § 44-  
13 1372.01(C) (Failure to comply with this article is an unlawful practice pursuant to section  
14 44-1522) A.R.S. § 44-1522 provides:  
15

16 The act, use, or employment by any person of any deception, deceptive act or practice,  
17 fraud, false pretense, false promise, misrepresentation, or concealment, suppression or  
18 omission of any material fact with intent that others rely upon such concealment,  
19 suppression or omission, in connection with the sale or advertisement of any  
merchandise whether or not any person has in fact been misled, deceived, or damaged  
thereby, is declared to be an unlawful practice.  
20

21 A.R.S. § 44-1522 does not "expressly regulate the use of electronic mail to send  
22 commercial messages".  
23

24 15 U.S.C. § 7707(b)(1) pre-emption does not apply for two reasons:  
25

**First**, A.R.S. §44-1522 does not "expressly regulates the use of electronic mail"; and

1           **Second**, A.R.S. §§ 44-1372 and 44-1522, read together “prohibit falsity or deception  
 2 in any portion of a commercial electronic mail message”.

3           As legislative acts, A.R.S. §§44-1522 and 44-1372 are presumed to be valid. *City of*  
 4 *Phoenix v. Fehlner*, 90 Ariz. 13, 18, 363 P.2d 607, 610 (1961). The party challenging the  
 5 legislative act has the burden of proving the unconstitutionality of the act. Id. at 18, 363  
 6 P.2d at 610. Defendants have proffered no such proof.

7           **2) State Law Prohibits Defendant From Trespassing On Plaintiff's Computer With Its**  
 8           **Electronic Messages.**

9           As if inviting claims of “trespass” against spammers, the Congress saw it fit to permit  
 10 state claims based on “trespass”. 16 U.S.C. § 7707(b)(2)(A)

11           Despite being a well-aged cause of action, trespass to chattels<sup>1</sup> has been applied in the  
 12 context of the internet. Electronic signals generated and sent by computer have been held to be  
 13 sufficiently physically tangible to support a trespass cause of action in *Thrifty-Tel, Inc. v.*  
 14 *Bezenek*, 46 Cal. App. 4th 1559, 1567 (1996). In *CompuServe, Inc. v. Cyber Promotions, Inc.*,  
 15 962 F. Supp. 1015, 1022 (S.D. Ohio 1997), the court held that a spammer could be held liable  
 16 to an internet service provider for sending unsolicited emails to the provider's clients. The court  
 17 found that “[e]lectronic signals generated and sent by computer” were “sufficiently  
 18 physically tangible to support a trespass cause of action.” (emphasis supplied) Id. at 1021.

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22  
 23           <sup>1</sup> Dubbed by Professor Prosser the “little brother of conversion,” the tort of trespass to chattels  
 24 allows recovery for interferences with possession of personal property “not sufficiently important  
 25 to be classed as conversion, and so to compel the defendant to pay the full value of the thing with  
 which he has interfered.” (Prosser & Keeton, Torts (5th ed. 1984) § 14, pp. 85-86.) Under section  
 218 of the Restatement Second of Torts, dispossession alone, without further damages, is  
 actionable (see id., par. (a) & com. d, pp. 420-421).

In recent years, trespass to personal property, which had been largely relegated to a historical note in legal textbooks, has reemerged as a cause of action in Internet advertising and e-mail cases. A series of federal district court decisions, beginning with *CompuServe, Inc.*, has approved the use of trespass to personal property as a theory of liability for "spam e-mails". See *America Online, Inc. v. IMS*, 24 F. Supp. 2d 548 (E.D. Va. 1998); *Hotmail Corp. v. Van Money Pie Inc.*, 1998 WL 388389 (N.D.Cal. Apr. 16, 1998); *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444 (E.D.Va. 1998); *America Online, Inc. v. Prime Data Systems, Inc.*, 1998 WL 34016692 (E.D.Va. Nov. 20, 1998).

Trespass to chattel is a recognized cause of action in Arizona. See, e.g. *Koepnick v. Roebuck*, 158 Ariz. 322, 762 P.2d 609, (App.1988).Trespass to chattel in the context of electronic invasion of another's computer system is also recognized. See *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 170 P.3d 712 (App. 2007)<sup>2</sup>. It is established law that even if (spam e-mail) occupies a small portion of the Plaintiff's computer memory, liability lies. *eBay, Inc. v. Bidder's Edge, Inc.* 100 F.Supp. 2d 1058, 1071 (N.D.Cal. 2000) ("Even if, as [defendant]

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<sup>2</sup> *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) ("A plaintiff can sustain an action for trespass to chattels, as opposed to an action for conversion, without showing a substantial interference with its right to possession of that chattel."). While the Court in *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348 (4th Cir. 11/17/2006), based on the law of Oklahoma, found that no trespass to chattel cause of action could be maintained for sending unsolicited e-mail, Arizona Court of Appeals did not follow that reasoning see *Mobilisa, supra*. Using someone else's computer equipment is trespass. *McLeodUSA Telecommunications Services, Inc. v. Qwest Corp.*, 469 F.Supp.2d 677 (N.D.Iowa 01/16/2007) Restatement (Second) of Torts §217 (trespass to chattel occurs through either through "dispossession" of chattel or intermeddling with chattel "in the possession of another"). *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) (finding trespass to chattels for interference with plaintiff's computer systems rather than its website or domain name).

1 argues, its searches use only a small amount of eBay's computer system capacity,  
2 [defendant] has nonetheless deprived eBay of the ability to use that portion of its personal  
3 property for its own purposes. The law recognizes no such right to use another's personal  
4 property."

5 In the matter at hand, Defendants - without authority or invitation – invaded  
6 Plaintiff's private computer and squatted in its memory. There is little difference between  
7 Peter Piper Pizza two-for-one ad being pasted on the front door of Plaintiff's home and  
8 Defendants pasting the offensive e-mail onto the computer screen. Both constitute  
9 "trespass".

10 **3) State Law Prohibits Defendants From Intruding upon Plaintiff's Seclusion By**  
11 **Bombarding Plaintiff With Unwanted Messages.**

12 Arizona recognizes the four branches of the tort of invasion of privacy outlined in the  
13 Restatement: 1) intrusion on seclusion; 2) commercial appropriation; 3) publication of  
14 private facts; and 4) false light. Rest. (Second) of Torts § 652A (1977); *Godbehere v.*  
15 *Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 781, 784 (Ariz. 1989) (citing Rest. §  
16 652A-I); *Hart v. Seven Resorts Inc.*, 190 Ariz. 272, 947 P.2d 846, 853 (App. 1997). The  
17 Restatement describes the tort of intrusion upon seclusion as follows: "One who  
18 intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or  
19 his private affairs or concerns, is subject to liability to the other for invasion of privacy, if  
20 the intrusion would be highly offensive to a reasonable person." *Hart*, 947 P.2d at 853  
21 (quoting Rest. § 652B) A defendant is liable "when he has intruded into a private place, or  
22

1 has otherwise invaded a private seclusion that the plaintiff has thrown about his person or  
2 affairs." Id. (citing Restatement § 652B cmt. c).

The constant bombardment by unsolicited e-mails – sometimes tens, sometimes  
4 hundreds - into Plaintiff's private e-mail box has become such an offensive misconduct that  
5 both the United States Congress and the Arizona Legislature have attempted to thwart it by  
6 legislation. *See, e.g.*, the CAN-SPAM act; ACEMA. Yet, the spamming continues. Asking  
7 an average person whether spamming is “highly offensive” would certainly elicit a positive  
8 response.  
9

#### **4) Damages.**

Plaintiff is entitled to two types of damages: Statutory (A.R.S. § 44-1372.02) and common law. On the matter of common law damages, Plaintiff has been damaged in two ways: First, by Defendants' unsolicited e-mail occupying Plaintiff's computer memory; and, Second, by deceiving Plaintiff into opening the e-mail, reviewing and studying the e-mail to ensure that it does not relate to Plaintiff's important clients, causing Plaintiff to refocus from current commercial operations to wasteful loss of time. While damages may be difficult to ascertain, it is the genius of the common law that difficult damage questions are left to juries. See *Meyer v. Ricklick*, 99 Ariz. 355, 357-58, 409 P.2d 280, 281-82 (1965) (damage amount is peculiarly within jury's province, and the "law does not fix precise rules for the measure of damages but leaves their assessment to a jury's good sense and unbiased judgment"). . . . *Walker v. Mart*, 164 Ariz. 37, 41, 790 P.2d 735, 739 (1990); *Logerquist v. McVey*, 196 Ariz. 470, 491, 1 P.3d 113, 134 (2000)

## **CONCLUSION AND PRAYER FOR RELIEF**

For the foregoing reasons Plaintiff respectfully requests that the Defendants' Motion be denied in its entirety or, in the alternative, that Plaintiff be granted leave to amend its Complaint.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of August, 2008.

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